Supreme Court, U.S.
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No. 03-1020

In the
Supreme Court of the United States

THE HONORABLE MARTIN L. MARKS, DDS,

Petitioner,

– v.–

UNION COUNTY DEMOCRATIC COMMITTEE, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION

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February 17, 2004

Democratic County Committee Respondents

The Union County Democratic Committee; Charlotte DeFillippo, Chairperson of the Union County Democratic Committee; the Somerset County Democratic Committee; Elia A. Pelios, Chairperson of the Somerset County Democratic Committee; the Middlesex County Democratic Committee; Joseph C. Spicuzzo, Chairperson of the Middesex County Democratic Committee; Elizabeth Genievich; Geraldine C. Farley; Maureen Coxwell; and Nicholas P. Scutari, as the Democratic Party's Candidate for the Office of State Senator in the 22nd Legislative District

QUESTION PRESENTED

Whether the New Jersey Supreme Court offended federal constitutional requirements when it affirmed a trial court's decision that interpreted New Jersey *state* law to permit a local political party to name a new candidate for a *state* office in the place of the previously nominated candidate who had withdrawn his candidacy.

CORPORATE DISCLOSURE STATEMENT

The Union County Democratic Committee has no parent corporations and no publicly owned company holds 10% or more of the company's stock.

The Somerset County Democratic Committee has no parent company and no publicly owned company holds 10% or more of the company's stock.

The Middlesex County Democratic Committee has no parent company and no publicly owned company holds 10% or more of the company's stock.

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STATEMENT

This is an election case. Petitioner seeks review of an order of the New Jersey Supreme Court that denied Petitioner's application for emergency relief from a trial court's order and decision that interpreted a provision of New Jersey election law. Specifically, the lower court interpreted a provision of New Jersey election law to permit a local political party to name a new candidate for state office in the place of the previously nominated candidate who withdrew his candidacy 39 days before the general election. The court below, relying on *Democratic Party v. Samson*, 175 N.J. 178 *cert denied*, 532 U.S. 1083 (2002), found that it was administratively feasible to replace the withdrawn candidate's name on the ballot with the name of the replacement candidate selected by the local political party, and therefore, permitted the replacement candidate's name to appear on the ballot for the general election. The lower court's decision is a reasonable interpretation of state law, presents no important federal question, and does not offend prior decisions of this Court, or any decisions of any other federal or state court. Thus, this Court lacks jurisdiction to review this matter.

This case emanates from the decision of the Hon. Joseph S. Suliga, the New Jersey Democratic Party's candidate for the office of State Senate in New Jersey's 22nd Legislative District, to withdraw as a candidate for that office. State Senator Suliga, the incumbent State Senator, was duly elected by the Democratic voters of the 22nd Legislative District in the June 4, 2003 primary election. The only other candidate certified to be on the ballot for the November 4, 2003 general election for the office of State Senator for the 22nd Legislative District, aside from Senator Suliga, was Petitioner Martin Marks. On Friday, September 26, 2003, Senator Suliga informed the Chairpersons of the Democratic County Committees for the counties comprising the 22nd Legislative District of his decision to withdraw as a candidate.

On Monday, September 29, 2003, on the application of the Democratic County Committees, the Chairpersons of the Democratic County Committees, three voters residing in the 22nd Legislative District and the future replacement candidate (collectively "Respondents"), the Superior Court of New Jersey, Law Division, Union County, entered an order for temporary restraints that enjoined the three county clerks from printing and distributing official election ballots containing the name of "Joseph S. Suliga" as the New Jersey Democratic Party's Candidate for State Senator in the 22nd Legislative District. On October 1, 2003, the members of the respective Democratic County Committees representing the 22nd Legislative District selected the Hon. Nicholas P. Scutari to fill the vacancy created by State Senator Suliga's departure.

After hearing oral argument on Respondents' petition for an Order to Show Cause on October 3, 2003, the superior court entered an order permanently enjoining the printing and distribution of official ballots with the name of "Joseph S. Suliga" and directing the printing and distribution of official ballots with the name of "Nicholas P. Scutari" as the Democratic Party's candidate for State Senator.

Four days later, on October 7, 2003, Petitioner filed a Notice of Appeal in the New Jersey Superior Court, Appellate Division seeking emergent relief. Petitioner simultaneously sought a stay from the lower court. On October 8, 2003, the lower court denied Petitioner's application for a stay of its order finding that the case law was well-settled on the matter. Thereafter, the appellate court denied Petitioner's emergent application on October 10, 2003. In so doing, the appellate court summarily affirmed the lower court's decision and specifically cited *Samson, supra*. On October 14, 2003, four days after the appellate court's decision was rendered, Petitioner filed an application for appeal and emergent relief to the New Jersey Supreme Court. On October 15, 2003, the New Jersey Supreme Court denied Petitioner's appeal and request for

emergent relief, with costs. On October 22, 2003, one week after the New Jersey Supreme Court denied Petitioner's appeal, and with less than two weeks before the general election, Petitioner filed an emergency application to Justice David H. Souter, as single Circuit Justice for the Third Circuit, seeking a stay of enforcement pending the filing and disposition of a Petition for Writ of Certiorari. Respondents filed a brief in opposition to Petitioner's stay application on October 24, 2003. On that same day, Justice Souter denied Petitioner's application for a stay. Nearly three months later, Petitioner filed the instant Petition for Writ of Certiorari, requesting this Court both overturn the New Jersey Supreme Court's order in this case, and revisit its decision to deny certiorari in *Samson* that was rendered over a year ago.

ARGUMENT

Shortly over one year ago, in *Democratic Party v. Samson*, 175 N.J. 178, *cert. denied*, 532 U.S. 1083 (2002), this Court denied certiorari. In that remarkably similar case, the New Jersey Supreme Court construed the same provision of New Jersey election law to permit a state political party to fill a vacancy created by the withdrawal of a candidate for office of United States Senate. Petitioner, who was not a party to the *Samson* case, now asks this Court to revisit its decision to deny certiorari in *Samson*. Strikingly, Petitioner does so in the context of review a *state* court's interpretation of *state* election law as applied to an election for *state* office. However, the lower court's decision represents an interpretation of state law that is entirely consistent with its settled past precedent. Contrary to Petitioner's contention, there is nothing in the state court's order to distinguish it from the work of state courts around the country when called upon to apply state laws to varying circumstances. Thus, as this Court correctly recognized in *Samson,* further review by this Court is simply not warranted.

Petitioner's attempt to characterize this matter as one implicating the protections of U.S. Const. Art. 1 § 4, cl. 1 is futile and misplaced. Article 1 § 4, cl. 1, which governs federal congressional elections, has no bearing, whatsoever, on this matter which concerns a *state* court's interpretation of *state* election law as it applies to an election for *state* office. Likewise, Petitioner's claim that a federal question warranting this Court's review is present in this matter is not salvaged by his contention that the lower court's order offends the Due Process Clause of the Fifth and Fourteenth Amendments. Without any legal support, and based on a factual premise which, at best, is speculative, Petitioner claims that voters' ability to be informed about the candidates for election will be impaired by the lower court's ruling. However, the factual record, the precedent of this Court, and plain common sense,

all dictate that the lower court's decision did not infringe upon any voter's ability to become informed about the relevant candidates for this elected office.

Nor does Petitioner's assertion that the lower court's order offends both the Equal Protection Clause of the Fifth and Fourteenth Amendments and the First Amendment rescue his claim that review by this Court is warranted. Petitioner's equal protection and First Amendment claims, which are premised on the allegation that there is a potential under New Jersey's state campaign finance laws for a replacement candidate to raise more funds than a candidate selected in the primary election, is based on a myriad of speculative facts. Moreover, the lower court's decision does not frustrate or depart from this Court's well-settled equal protection and First Amendment precedent, but instead furthers that precedent. In short, the alleged speculative and potential disparities that may result in the ability of candidates to raise funds under New Jersey's Campaign Finance Act, that form the basis of Petitioner's equal protection and First Amendment claims, even if credited, are far outweighed by the furtherance of the legitimate and paramount state interest of ensuring voter choice in elections.

1. The New Jersey Supreme Court's Reasonable Interpretation of New Jersey Election Law Does Not Present a Federal Question Warranting Review By This Court.

Petitioner's primary argument is that the lower court, in relying upon *Samson* to permit a vacancy for the state elected office to be filled 39 days prior to the general election, usurped the New Jersey Legislature's power under U.S. Const. Art. I., § 4, cl. 1. *See* Pet. At 12. The *Samson* case addressed the issues of whether a vacancy created within 48 days of a general election, by the withdrawal of a political party's

candidate for the office of United States Senate, could be filled by a political party committee pursuant to the procedures set forth in *N.J.S.A.* 19:13-20.

Petitioner fails to recognize the simple fact that unlike the election in *Samson*, which involved the filling of a vacancy for a candidate for the office of United States Senator, a federal congressional office that is specifically covered by Article I § 4 cl. 1, the present matter involves the filling of a vacancy for a candidate for the office of *state* senator. Thus, U.S. Const. Art. 1, § 4, cl. 1 has no bearing, whatsoever, on this matter because it does not involve a congressional election. This matter only concerns issues of interpretation of *state* law in the course of a *state* election, and accordingly, does not warrant review by this Court.

The authority of state courts to review election laws is no different than their authority to review any other laws; indeed, "interpretation of laws is the proper and peculiar province of the Courts." The Federalist No. 78 (Alexander Hamilton); see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-178 (1803). As the Court noted in *McPherson v. Blackner*, 146 U.S. 1 (1892), a state supreme court is constitutionally permitted to interpret a state law governing the appointment of electors. Indeed, this Court has recognized that "[w]e are not authorized to revise the conclusions of the state court on these matters of local law." *Id.* at 23.

Without any legal support, Petitioner asks this Court to embroil itself in this state law election matter solely because Petitioner disagrees with the outcome achieved in the state courts and the state legislature. *See* Pet. at 14-15. However, "[r]espect for the independence of state courts, as well as the avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground." *Michigan v. Long*, 463 U.S. 1032, 1040 (1983).

This Court's review of state court judgments has long been informed by the recognition that this Court has "no authority" to review a state supreme court's interpretation of state law. *See O'Connell v. Kirchner*, 513 U.S. 1303 (1995) (Stevens, J.) (denying petition for stay of Illinois Supreme Ct. decision on an issue of Illinois law). "None are more conscious of the vital limits on judicial authority than are the members of this Court." *Bush v. Gore*, 531 U.S. 98, 111 (2000).

2. The Decision Below is a Reasonable Interpretation of State Law

In *Samson*, the New Jersey Supreme Court specifically addressed the circumstances under which a vacancy, created between the 48th day and the general election, can be filled pursuant to the procedures set forth in a New Jersey statute, namely, *N.J.S.A.* 19:13-20. *Samson*, 175 N.J. at 194. In short, the New Jersey Supreme Court held that where "it is *administratively feasible*" to replace a candidate's name on the ballot during the period between the 48th day and the general election, the procedures set forth in *N.J.S.A.* 19:13-20 should be followed, notwithstanding the 48 day time period set forth in the statute. *Id* at 194 (emphasis added). The lower court, relying on *Samson*, found that it was administratively feasible to replace Joseph Suliga's name on the ballot with that of Nicholas Scutari under the facts and circumstances of the case before it.

In permitting Joseph Suliga to be replaced on the ballot by Nicholas Scutari, the lower court furthered several important principles articulated throughout New Jersey's election laws that were specifically recognized by the *Samson* Court. The *Samson* Court found that meaningful voter choice in elections is a paramount interest set forth in New Jersey's election laws and that New Jersey's election laws give political parties a right to select a candidate when a vacancy occurs. *Id*. The lower court's decision in this matter protects

both the paramount interest of providing meaningful voter choice in elections, as well as the rights of political parties to select candidates. In this matter, aside from State Senator Suliga, Petitioner was the only other candidate on the ballot for the office of State Senate for the 22nd Legislative District. Overturning the lower court's decision, which permitted the Respondents to replace State Senator Suliga's name on the general election ballot, would not only deprive the voters in the 22nd Legislative District, including Respondents Gunievich, Farley and Coxwell, of a meaningful choice, but it would also deprive them of any choice at all.

Moreover, the *Samson* Court explicitly instructed that if its interpretation of New Jersey's election laws was not consistent with the New Jersey Legislature's intent, then the New Jersey Legislature should act accordingly and amend the law. *See Samson*, 175 N.J. at 195, 199. To date, and well over a year since the *Samson* decision was rendered, the New Jersey Legislature has not passed any laws overturning the decision. This inaction provides further evidence that the *Samson* Court's interpretation of the 48 day time period in *N.J.S.A.* 19:13-20 is the appropriate interpretation of that state statute. While apparently cognizant of the failed attempts in the New Jersey Legislature to change New Jersey's election laws, Petitioner, nonetheless, asks this Court to engage in this matter and essentially re-write state law. However, because the lower court reasonably construed *N.J.S.A.* 19:13-20 consistent with the state legislature's intent and the *Samson* Court's instruction, the Court should refrain from reviewing the decision.

3. The Decision of the New Jersey Supreme Court Does Not Violate the Due Process Clause of the United States Constitution

Moreover, Petitioner's allegations of due process violations rely on wholly speculative factual premises that are inconsistent with the factual record established in the lower court. Petitioner purports to argue that the Due Process Clauses of the Fifth[1] and Fourteenth Amendments have been violated because voters will not have adequate time to become informed about the candidates for the state office if a vacancy is permitted to be filled within 48 days prior to the general election. Petitioner states a particular concern that absentee civilian and military ballot voters will not have adequate time to make an informed choice about the candidates for the election. However, Petitioner cites no law in support of his position, and the precedent of this Court, the facts in the record and common sense, all dictate that with over a month before the election, the lower court properly found that there was ample time for all voters, including absentee voters in the 22nd Legislative District, to make an informed choice.[2]

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[1] Petitioner fails to demonstrate how the Fifth Amendment, which addresses the United States Congress's powers to make laws that would violate due process, has any bearing, whatsoever, on this state law matter.

[2] The trial court stated:

> Full voter choice, therefore, dictates the substitution be permitted and the general statutory intent and underlying purpose of the elections law will be furthered. My conclusion is that the substitution of a candidate *roughly one month* before election day of this year will not significantly impact upon the voters' ability to learn about the candidates, evaluate them and have sufficient time and opportunity to reach an informed decision and unhurried choice.

See PA77-78.

Petitioner further purports to champion the rights of absentee civilian and military voters, yet the operative facts demonstrate, and the trial court correctly recognized that their ability to become informed about the candidates for the pending election would not be infringed. The concern of absentee civilian and military voters' ability to become informed about candidates when a vacancy occurs within little over a month before a general election was before this Court when it denied certiorari in *Samson*. The facts before the lower court in this matter were, again, even more compelling than those before this Court when it denied certiorari in *Samson*. In the *Samson* case, there were over 19,000 absentee ballot requests. Significantly, at the time of the *Samson* Court's opinion, approximately 1,700 had already been mailed to absentee voters and ballots had been returned. *Samson*, 174 N.J. at 196. At the time the trial court granted respondent's application, no absentee ballots had been mailed to absentee civilian or military voters and less than 500 voters had made requests for absentee ballots.[3]

Certainly, the less than five hundred (500) absentee ballot voters in this matter were not disenfranchised by the lower court's decision permitting a replacement candidate to fill a vacancy 39 days before the general election. More significantly, unlike the facts in *Samson*, at the time of the filing of

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[3] The trial court requested that the three County Clerks provide it with the numbers of absentee and military service ballots requested as of October 2, 2003. Middlesex County, which contains two (2) municipalities in the 22nd Legislative District, Dunellen Borough and Middlesex Borough, had received a total of twenty-four (24) requests for civilian absentee ballots and one (1) request for a military ballot. Somerset County, which contains two (2) municipalities in the 22nd Legislative District, Green Brook Township and North Plainfield Borough, had received a total of forty-one (41) requests for civilian absentee ballots and zero (0) requests for military ballots. Union County, which contains the largest number of voters in the 22nd Legislative District, had received three hundred thirty-nine (339) requests for civilian absentee ballots and one (1) request for a military ballot. P[illegible] (A23-26).

this action, no absentee ballots had been mailed. See PA75. In fact, Union County, the County in this matter whose geography comprised the vast majority of the legislative district's votes, had yet to even print its ballots. See PA74.

The decisions of this Court have consistently reflected faith in the ability of voters to inform themselves about campaign issues within a month before an election. *Anderson v. Celebrezze*, 460 U.S. 780, 797 (1983). Indeed, this Court has recognized that "there is a clear indication that campaign spending and voter education occur largely during the month before an election." *Id.* quoting *Dunn v. Blumstein*, 405 U.S. 330 (1972). Moreover, common sense and awareness of modern communication methods dictate that all voters in the 32nd Legislative District would have ample opportunity to make an informed choice, despite the fact that the lower court permitted a replacement candidate with just a month before the general election. This Court has specifically recognized that "today even trivial" details about candidates for election are "instantaneously communicated nationwide in both verbal and visual form." *Anderson*, 460 *U.S.* at 797. "[A]s a matter of practical politics, the electoral process contains its own cure for voters' ignorance about a particular candidate. Unknown candidates simply do not win large numbers of votes. A key goal of every political campaign is to promote the candidate's name identification among the electorate." *Anderson*, 460 U.S. at 799, n. 25. In this regard, it is important to note that Petitioner's ability to inform voters of his candidacy and position on the issues was, in no way, impeded by the lower court's decision in this matter.

Accordingly, Petitioner has not demonstrated that the lower court's decision permitting a replacement candidate to fill a vacancy with little over a month before a general election would either inhibit voters' ability to be informed about a candidate for election or violate the Due Process Clause of the Fifth and Fourteenth Amendments.

4. The Decision of the New Jersey Supreme Court Does Not Violate the Equal Protection Clause of the United States Constitution

Petitioner's equal protection argument also rests upon a wholly speculative factual premise concerning events, which even to this late date, have not, and may never, occur. Moreover, even if the potential dissimilarities that Petitioner claims establish his equal protection claim were ripe for review, they do not constitute a violation of equal protection and certainly do not stray from the equal protection analysis prescribed by this Court and accordingly, do not warrant consideration by this Court.

Petitioner argues that his equal protection rights were violated because Suliga Scutari, as the replacement candidate, had the potential to raise more money than Petitioner did under New Jersey's Campaign Finance Act. Yet, Petitioner's argument that his equal protection rights were violated is premised upon a myriad of speculations about events that Petitioner has not established ever occurred. Specifically, Petitioner relies upon the Certification of Larry Weitzman which states that it was theoretically possible, under New Jersey's Campaign Finance Act, for $132,000.00 of the $189,000.00 raised by State Senator Suliga to be transferred to candidate Scutari. Petitioner further speculates, without any support, that the donors who contributed to State Senator Suliga would likely contribute, again, to candidate Scutari and accordingly, candidate Scutari would be able to raise more funds than Petitioner. Importantly, no proofs toward this end were established before the lower court.

The lower court correctly recognized that "as of this moment" none of Petitioner's rights had been harmed and thus, Petitioner's equal protection argument was premature. PA78. It is well-settled that to establish a constitutional claim "first and foremost, there must be alleged (and ultimately

proved) an 'injury in fact' — a harm suffered by the plaintiff that is '*concrete*' and '*actual or imminent*', not '*conjectural*' or *hypothetical*." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) *quoting Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983) (emphasis added). Because Petitioner has not demonstrated that his fears have been realized, the lower court correctly found that Petitioner's equal protection claim is premature. Moreover, even if Petitioner's claim was ripe, Petitioner has failed to demonstrate that the lower court's decision results in a departure from the equal protection analysis articulated by this Court, thus warranting reversal.

In analyzing equal protection claims, this Court has instructed that courts must start with the assumption that legislatures have acted constitutionally. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Under traditional equal protection principles, distinctions need only be drawn in such a manner as to "bear some rational relation to a legitimate state end." *Id.* "Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them." *Id.* This Court has held that "[t]he Equal Protection Clause allows the States considerable leeway to enact legislation that may appear to affect similarly situated people differently." *Id.* at 963. A departure from this traditional equal protection analysis is appropriate only when the challenged statute places burdens on suspect classes or fundamental rights. *Id.* at 963 *citing San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

Contrary to Petitioner's contention, the lower court's decision does not offend the traditional equal protection analysis of this Court, but instead, it furthers it. Strikingly, Petitioner has failed to demonstrate that he has suffered the infringement of a fundamental right. Indeed, this Court has recognized that political candidacy is not a fundamental right and that any restriction upon that right would not be

subject to a stringent standard of review. *Bullock v. Canton*, 405 U.S. 134, 142-43 (1972). Moreover, this Court has held that "the existence of barriers to a candidate's access to the ballot does not itself compel close scrutiny." *Clements*, 457 U.S. at 963.

Petitioner falls far short in his attempt to demonstrate that his alleged disparate treatment under New Jersey's campaign finance laws has placed any condition on the voters' rights to exercise the franchise or that any votes have been quantitatively diluted which would warrant strict scrutiny review. *See Bullock*, 405 U.S. at 143. The potential disparity in the ability to raise campaign funds in no way affects the rights or ability of the voters to exercise the right to franchise. Petitioner argues that voters' ability to make an informed choice in the election is somehow tied to Petitioner's ability to raise funds for his candidacy. However, the ability of voters to exercise the franchise and make an informed choice is not strongly impacted by the ability of candidates to raise identical campaign funds. It is simple political reality that in the vast majority of elections candidates neither raise, nor spend, equal amounts of money. Thus, Petitioner cannot demonstrate that a potential disparity in the ability of candidates to raise money requires the most stringent review by this Court.

Accordingly, because the lower court's ruling advances the paramount interest of promoting meaningful voter choice in elections, an interest which is clearly outweighed by a potential disparity in the abilities of candidates to raise equal campaign funds, the lower court's decision does not offend equal protection.[4] In fact, if Petitioner were to be granted the

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[4] The New Jersey Superior Court, Appellate Division, considered the issue of whether potential disparities in the ability of a replacement candidate and a candidate selected in a primary election to raise funds under New Jersey's gubernatorial campaign finance laws violated equal protection in *Schundler v. Paulsen*, 340 N.J. Super. 319 (App. Div. 2001).

relief he has requested, voters in the 22nd Legislative District would be deprived of any choice at all, let alone a meaningful choice for the office of state senator.

The Appellate Division held that no equal protection violation existed because the potential disparities in funding were rationally related to legitimate government interests of voter choice and the public policy of New Jersey favoring contested elections. *Id.*

CONCLUSION

For the foregoing reasons, the Respondents respectfully request that Petitioner's Writ of Certiorari and request for other relief be denied.

Respectfully submitted,

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